United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1359

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER CAPARRO,

Plaintiff-Appellant,

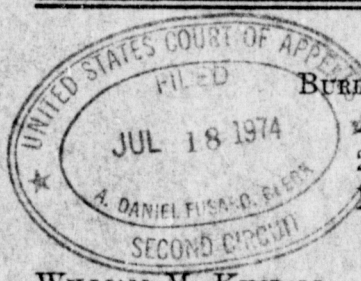
—against—

KONINKLIJKE NEDERLANDSCHE
STOOMBOOT MAATSCHAPPIJ N.V.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE'S BRIEF



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Issue

Did plaintiff prove *prima facie* unseaworthiness?

Statement

Plaintiff longshoreman appeals judgment directed by Tyler, J. notwithstanding verdict for plaintiff on his unseaworthiness claim.*

* Plaintiff's accident occurred before 1972 amendment of the Longshoremen's & Harbor Workers' Compensation Act eliminated such claims. Plaintiff does not appeal judgment on the directed verdict dismissing his negligence claim.

The longshoremen were stowing cartons, using a hilo to tier heavier ones (29a-30a). Either when the hilo forks were "almost out" (38a-39a), or 10-15 seconds after the hilo pulled its forks out (48a) from beneath a 250+lb. carton (35a-36a), the carton fell (44a, 51a) and indirectly injured plaintiff.

As stressed during trial (56a, 58a, 65a, 66a) and in his brief (p. 5), the sole basis of plaintiff's unseaworthiness claim is that the 250+lb. carton made the stow top-heavy. Judge Tyler dismissed that claim on authority of *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), (88a-91a).*

Although plaintiff made no such claim nor offered any substantiating evidence, Judge Tyler charged that plaintiff could recover if proximately injured by unsafe stowage existing before the 250+lb. carton was stowed (82a),** to which defendant specifically excepted (85a).

Judge Tyler reserved decision on defendant's directed verdict motion (62a-63a). After the verdict, the Judge granted that motion and directed entry of judgment for defendant notwithstanding the verdict (91a), also ruling on and provisionally granting defendant's motion for a new trial (93a), as required by F.R. Civ. P. 50(c)(1).

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* As plaintiff's counsel summarized: "Usner states that instantaneous negligence cannot constitute an unseaworthy condition. The condition has to arise first." (57a)

** Without exception by plaintiff (85a), Judge Tyler seemingly charged that this unasserted, unproven claim was the only basis upon which plaintiff might recover (84a).

Argument

Usner sanctioned dismissal of plaintiff's top-heavy unseaworthiness claim.

In *La Fleur* v. *M.S. Maule,* 349 F. Supp. 1318, 1320 (W.D. La. 1972), aff'd w/o op. 467 F. 2d 944 (5 Cir. 1972), "stowage was incomplete and the cargo was not yet ready for sea" and 100 lb. bags of rice which the longshoremen "had just stacked came tumbling down." * The Court concluded on *Usner* authority that there was no unseaworthiness, 349 F. Supp., p. 1321.

In *Smith* v. *Olsen & Ugelstad,* 459 F. 2d 915 (6 Cir. 1972), cert. denied 409 U.S. 1040 (1972):

> "The [hilo] operator then removed two crates which were lower than the fatal crate and which partly supported it. This crate remained precariously balanced for approximately thirty seconds and then fell, striking Smith and instantly killing him. The normal procedure is to remove the higher crate first." 459 F. 2d, p. 917.
>
> "Appellant suggests in her brief that the removal of the supporting crates left the one that fell in a 'dangerous and unsupported condition.' [Appellee] argues that the result of this 'condition' was that the crate quickly fell. Appellee contends that the death of Joseph Smith resulted from the negligent act of the hilo operator and

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* *Cf. Carabellese* v. *Naviera Aznar, S. A.*, 285 F. 2d 355, 359 (2 Cir. 1960), cert. denied 365 U.S. 872 (1961), where unseaworthiness was *arguendo* assumed if a top-heavy "crate had been improperly stowed and had fallen on the plaintiff as he undertook some later operation. But we know of no case that has imposed absolute liability on the owner where the alleged danger was inherent in the cargo and this was still in the course of being loaded."

not from any condition of unseaworthiness." 459 F. 2d, p. 918.

Relying on *Usner*, the Court reasoned:

> "Thus it is necessary to determine whether the death of Smith resulted from an act of negligence or a condition of unseaworthiness. Very likely a resolution of this problem will often involve metaphysics as well as judgment. A negligent act conceivably could produce a hazardous condition or it might be completed without causing this result. The determination of the distinction will oftentimes be elusive and will depend upon the particular facts of the given case." 459 F. 2d, p. 919.

The Court held that dismissal was substantiated by the fact that the fatal injury occurred within 30 seconds of the negligent act, 459 F. 2d, p. 919.

Judge Tyler charged an unseaworthiness theory which plaintiff neither claimed nor sought to prove.

> "It follows that an issue was submitted to the jury on which there was no evidence. This was reversible error, as is attested by myriad cases [citations omitted]." *Mandel* v. *Pennsylvania Railroad Co.*, 291 F. 2d 433, 435 (2 Cir. 1961), cert. denied 368 U.S. 938 (1961)

Thus, because *Usner* precluded recovery on plaintiff's sole claim of top-heavy unseaworthiness, and because the jury could not properly find for plaintiff on unclaimed, unproven pre-existing unseaworthiness, Judge Tyler properly directed judgment for defendant because plaintiff failed to prove *prima facie* unseaworthiness.

Conclusion

The judgment appealed should be affirmed.

Respectfully submitted,

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